BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL R. SMITH	)	
Claimant	)	
	)	
VS.	)	
	)	
PREMIER TECHNOLOGIES, INC.	)	
Respondent	)	Docket No. 270,731
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the February 14, 2003 Award entered by Administrative Law Judge Jon L. Frobish. On August 20, 2003, the parties' oral arguments were made to the Board.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. John R. Emerson of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant met with personal injury by accident arising out of and in the course of his employment with respondent. The nature and extent of claimant's disability was disputed. The Administrative Law Judge (ALJ) determined claimant made a good faith effort in finding employment after being laid off by respondent and therefore awarded the claimant a 63 percent work disability based on a 100 percent wage loss and a 26 percent task loss.

The respondent requests review of the nature and extent of claimant's disability and argues claimant did not make a good faith effort to find appropriate employment.[1] Consequently, respondent argues a wage should be imputed to claimant. And respondent further argues the task loss opinions of the physicians should not include tasks the physician's were unsure claimant could perform.

Claimant argues he is entitled to a 67.35 percent work disability based on a 100 percent wage loss and a 34.7 task loss. Claimant also argues because temporary total disability compensation was paid at an incorrect rate there has been an underpayment of temporary total disability benefits.[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Briefly stated, the claimant was employed as a sheet metal worker for respondent. His job duties required the use of power tools, crimpers, hammers and repetitive use of his hands. Claimant developed bilateral carpal tunnel syndrome. Claimant received conservative treatment from Dr. Larry T. Bumguardner. Respondent went out of business and claimant's last day worked was October 14, 2001.

Claimant was referred to Dr. J. Mark Melhorn for treatment. Ultimately, Dr. Melhorn performed surgery for claimant's right carpal tunnel syndrome on February 19, 2002. On April 2, 2002, left carpal tunnel surgery was performed. Dr. Melhorn released claimant from further care on May 31, 2002, and imposed permanent restrictions limiting the use of power and vibratory tools to four hours a day with task rotation.

It was undisputed that claimant suffered a 17 percent permanent partial functional disability to the whole body. It was further undisputed that claimant was entitled to a work disability because respondent was no longer in business and could not provide claimant employment. The disputed issue was the nature and extent of claimant's work disability. Claimant's permanent partial general disability is determined by K.S.A. 44-510e(a), which provides, in part:

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[1] Respondent's application for review raised the issue of claimant's average weekly wage but at oral argument before the Board, the parties agreed there was no dispute regarding the ALJ's determination of the amount of claimant's average weekly wage.

[2] The ALJ's award was calculated based upon $606 average weekly wage and a $404 temporary total disability rate. Consequently, any underpayment of temporary total disability compensation was corrected in the Award. However, the correct temporary total disability compensation rate should have been $404.02. This minor error will be corrected by the Board in the calculation of the Award.

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

K.S.A. 44-510e(a) sets forth the formula for determining claimant's permanent partial general disability. But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

According to the appellate court decisions, in determining permanent partial general disability, the question is whether the worker has made a good faith effort to find and retain

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Id.* at 320.

appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed.

As the Kansas Court of Appeals recently held in *Watson*[6], the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

Claimant provided a list of employers he had contacted for work after he was released from treatment by Dr. Melhorn. He also placed his resume on the internet. Claimant unsuccessfully attempted to start his own car delivery service. He did obtain a job installing vinyl siding but only worked one day because the job hurt his hands. Claimant also found a job with a contractor but again the job required work that caused his hands to hurt and consequently, claimant only worked approximately a day and a half for that employer.

The claimant contacted 19 employers in the approximate four and one half months between the time he was released from treatment and the regular hearing. But claimant conceded that he was aware that a lot of the jobs he applied for were not within his restrictions and 13 of the prospective employers were not hiring. James Molski, a vocational rehabilitation consultant, agreed that in conducting a job search it would be inappropriate and a waste of time to submit applications for jobs that the individual is not qualified to perform.

The fact claimant applied for jobs outside his restrictions is demonstrated by the evidence that he just worked a day for one employer and a day and a half for another because the jobs caused his hands to hurt. Applying at only 19 businesses in four and a half months cannot be said to demonstrate a good faith effort to find employment. Nor can applying for jobs outside claimant's restrictions be said to demonstrate a good faith effort to find appropriate employment. The Board concludes the claimant failed to make a good

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[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

faith effort to find appropriate employment. Accordingly, the Board will impute a post-injury wage based upon the evidence in the record.

Mr. Molski opined that claimant has the ability to earn $8 or $9 an hour. The two jobs claimant obtained but was unable to perform paid $7.50 and $8 an hour. The Board concludes claimant has the ability to earn $8 an hour and that wage will be imputed for calculation of the wage loss component of the work disability formula. Consequently, comparing a $320 imputed post injury average weekly wage to the $606 pre-injury average weekly wage results in a 47 percent wage loss.

The Board must next consider, under K.S.A. 44-510e, what, if any, task loss claimant suffered as a result of his injuries with respondent. Both Drs. Stein and Melhorn provided task loss opinions after reviewing the task list created by vocational expert James Molski. Dr. Stein opined claimant could no longer perform 7 to 9 of the 23 listed tasks for a 30 to 39 percent loss. Dr. Melhorn concluded claimant had a 17.4 percent task loss. The ALJ concluded the claimant's task loss lies somewhere between the 34.5 percent and 17.4 percent ratings. Averaging Dr. Stein' 30 percent with Dr. Melhorn's 17.4 percent yields 24 percent, which the Board finds as the percentage of work tasks that claimant performed in the 15-year period before his October 14, 2001 accident that he is no longer able to perform.

Averaging claimant's 47 percent wage loss with his 24 percent task loss yields a 36 percent work disability for which claimant should receive permanent partial general disability benefits. Accordingly, the February 14, 2003 Award should be modified.

In all other regards, the ALJ's Award is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Jon L. Frobish dated February 14, 2003, is modified and an award is granted in favor of the claimant, Daniel Smith, and against the respondent, Premier Technologies Inc. and its insurance carrier, Liberty Mutual Insurance Company, for an injury occurring on October 14, 2001, for a 36 percent permanent partial general disability.

The claimant is entitled to 33.57 weeks temporary total disability at the rate of $404.02 per week or $13,562.95 followed by 142.71 weeks at the rate of $404.02 per week or $57,657.69 for a 36 percent work disability, making a total award of $71,220.64.

As of September 12, 2003, there would be due and owing to the claimant 33.57 weeks of temporary total compensation at the rate of $404.02 per week in the sum of $13,562.95 plus 66.29 weeks of permanent partial compensation at $404.02 per week in the sum of $26,782.49, for a total due and owing of $40,345.44, which is ordered paid in

one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $30,875.20 shall be paid at $404.02 per week for 76.42 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director